IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.1517 OF 2002

Pedru Mozes Fernandes ..Petitioner.

Vs.

National Textile Corporation
(S.M.) Ltd. ..Respondent.

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Mr.N.M.Ganguli for the Petitioner.

Mr.Shailesh More with Mr.S.M.Naik for
the Respondent.

...

CORAM : DR.D.Y.CHANDRACHUD, J.

8th April, 2005.

ORAL JUDGMENT :

1. In an appeal filed under Section 84 of the Bombay Industrial Relations Act, 1946 the Industrial Court has set aside an order of reinstatement and of backwages that was passed by the Labour Court. The Industrial Court has held that the approach notice that was preferred by the Petitioner was barred by limitation and that it was not preferred within the period stipulated in Section 42(4) of the Act. The Petitioner has

challenged the judgment and order of the Industrial Court in these proceedings under Article 226 of the Constitution.

2. The Petitioner joined the services of Tata Mills on 1st March, 1973 and was a permanent workman who was engaged as a boiler serviceman. The Petitioner worked continuously until 18th January, 1982. On this date a general strike took place in the Cotton Textile Industry including in Tata Mills. The case of the workman was that all the textile mills were closed for a long period of time as a result of the textile strike. As soon as the tension had eased, workmen started reporting for work and the Petitioner also reported for duty in front of the gates of the mill every day. However, according to the Petitioner the mill in collusion with the Rashtriya Mill Mazdoor Sangh (RMMS) took back only those workers on work who were deemed to be fit and proper according to the Union. According to the Petitioner, he was informed time and again by the security staff at the gate of the Mill and by the supervisory staff of the company that his name would appear on the notice board that would be displayed at the gate.

According to the Petitioner his services were never terminated and the relationship of employer and employee continued to subsist. The mill came to be taken over by the Central Government on 18th October, 1982 under the Textile Undertakings Takeover of Management Act, 1983 and it is the case of the Petitioner that even thereafter he had approached the Respondent for employment. Despite assurances, according to him, he was not engaged and eventually on 20th January, 1993 an approach notice under Section 42(4) of the Bombay Industrial Relations Act, 1946 was addressed to the Respondent. That having evinced no response, the Petitioner filed an application under Section 79 of the Act praying for a direction that he be allowed to resume duties with consequential benefits including backwages. The Respondent filed a written statement denying the allegations of the Petitioner and submitting inter alia that the delay on the part of the Petitioner in moving an approach notice was unexplained.

3. Evidence was adduced before the Labour Court both on behalf of the Petitioner and the Respondent. By an order dated 18th May, 1998 the

Labour Court came to the conclusion that the approach notice submitted by the Petitioner was not barred by limitation. The Labour Court held on the basis of the evidence that the workman had reported for duty on 18th January, 1982 in spite of the strike and that he had eventually sent an approach notice to the employer. The employer, the Labour Court held, ought to have allowed the workman to join duty as no charge sheet or a decision to dismiss the workman had been taken by the management. An order of reinstatement was passed and in so far as backwages were concerned, the Labour Court held that the Petitioner would be entitled to his backwages between 18th January, 1982 till 31st December, 1983 and from 20th January, 1993 till the date of reinstatement. The workman was thus held not to be entitled to his backwages for a period of approximately nine years. The matter was carried in appeal by the Respondent. By the impugned judgment and order dated 18th February, 2002, the Industrial Court held that the provisions of Section 42(4) of the Bombay Industrial Relations Act, 1946 were mandatory; that the workman had issued an approach notice only in January 1993 and that the delay in doing so

could not be condoned. In the circumstances, the order of the Labour Court came to be quashed and set aside and the application filed by the Petitioner was directed to stand dismissed.

4. The principal question which arises for consideration in these proceedings is whether the Industrial Court was justified in taking the view that the application filed by the Petitioner was liable to be dismissed on the ground that there was a non-compliance of the provisions of Section 42(4) of the Act. Counsel appearing on behalf of the Petitioner urged that the finding of the Industrial Court is ex-facie contrary to the statutory provisions of Sections 78 and 79 of the Act read with Section 42(4). On the other hand, the judgment of the Industrial Court is sought to be supported by counsel appearing on behalf of the Respondent with reference to a decision of a learned Single Judge of this Court in National Textile Corporation (South Maharashtra) Ltd. v. Mohd. Umar Mohd. Hanif (2001 II CLR 145).

5. In considering the submissions before the Court, it would be necessary to advert first and

foremost to the provisions of Section 78 which defines the power of the Labour Court. Clause A of sub-section (1) of Section 78 is in the following terms :

> "78. Powers of Labour Court - (1) A Labour Court shall have power to - A. decide -
>
> (a) disputes regarding -
>
> (i) the propriety or legality of an order passed by an employer acting or purporting to act under the standing orders;]
>
> (ii) the application and interpretation of standing orders;
>
> (ii) any change made by an employer or desired by an employee in respect of an industrial matter specified in Schedule III [except item (5) thereof] and matters arising out of such change;

(b) industrial disputes-

(i) referred to it under section 71 or 72;

(ii) in respect of which it is appointed as the arbitrator by a submission;

(c) whether a strike, lock-out [closure, stoppage] or any change is illegal under this Act;"

6. Section 79 of the Act inter alia prescribes in sub section (1) that proceedings before a Labour Court in respect of disputes falling under clause (a) of Paragraph A of sub section (1) of Section 78 shall be commenced on an application made by any of the parties to the dispute. Sub section (3) then is material for the purpose of these proceedings and provides as follows :

"(3) An application in respect of a dispute falling under clause (a) of paragraph A of sub-

section (1) of section 78 shall be made-

(a) if it is a dispute falling under sub-clause (i) or (ii) of the said clause, within three months of the arising of the dispute;

(b) if it is a dispute falling under, sub-clause (iii) of the said clause within three months of the employee concerned having last approached the employer under the proviso to sub section (4) of section 42;

[Provided that, the Labour Court may, for sufficient reasons, admit any application in respect of any dispute made to it under this sub-section after the expiry of the period of three months specified thereof under sub-clause (a) or (b), as the case may be.]

7. The position in law which emerges from these provisions is as follows :

Under paragraph A of sub section (1) of Section 78, the Labour Court has the power to decide three categories of disputes. The first category postulates that there is an order passed by an employer acting or purporting to act under the standing orders. It is only when an order is passed by the employer that a dispute regarding the propriety or legality of that order can arise. Therefore, clause (i) applies to a situation where an order has been passed by the employer. Clause (ii) deals with a dispute regarding the application and interpretation of standing orders. Clause (iii) relates to a change made by an employer or desired by an employee in respect of industrial matters specified in Schedule III except item 5 and matters arising out of such change. Item 6 of Schedule III it must be noted deals with employment including reinstatement. In the present case, admittedly, no order has been passed by the employer. The witness who deposed on behalf of the management specifically admitted in the course of his cross examination that the management had not issued any show cause notice, a charge sheet or an order of dismissal to the Petitioner. This is not a matter of any factual dispute. Therefore, the

jurisdiction of the Labour Court was a jurisdiction which arose with reference to Section 78 (1)(A)(iii) since it was a dispute relating to an industrial matter more particularly the employment of the Petitioner. That being the position, the period of limitation for filing a dispute would be governed by clause (b) of sub section (3) of Section 79. The period of limitation would be three months of the employee having last approached the employer under the proviso to sub section (4) of Section 42. The approach notice to the employer was made on 20th January, 1993 and the application before the Labour Court was filed on 29th March, 1993 within a period of three months. The proviso to sub section (3) of Section 79 empowers the Labour Court for sufficient reasons to admit an application after the expiry of a period of three months. However, the question of condoning delay would arise provided obviously there is a delay in filing the application. In the present case, the application was clearly within the period that has been prescribed in Section 79(3)(b) and there was therefore no question of seeking any condonation of delay.

8. Section 42(4) must also be noticed because it has a bearing on the present case and the Industrial Court was of the view that the application was barred by that provision. Section 42(4) provides as follows :

> "42(4) Any employee [or a representative union] desiring a change in respect of (i) any order passed by [the] employer under standing orders, or (ii) any industrial matter arising out of the application or interpretation of standing orders, or (iii) an industrial matter specified in Schedule III, [except item (5) thereof] shall make an application to the Labour Court [and as respects change desired in any industrial matter specified in item 5 of Schedule III, to the Industrial Court].
>
> Provided that no such application shall lie unless the employee [or a representative union] has in the prescribed manner approached [the] employer with a request for the change

and no agreement has been arrived at in respect of the change within the prescribed period."

9. Now what the proviso to sub section (4) of Section 42 lays down is that an application to the Labour Court must be preceded by an approach to the employer in the prescribed manner with a request for the change that is sought and that no agreement has been arrived at in the prescribed period. The *'prescribed manner'* is to be found in Rule 53 of the Bombay Industrial Relations Rules 1947. Rule 53 lays down that an application for a change in respect of an order passed by the employer under the standing order shall be made within a period of three months from the date of such order. Obviously therefore the period of limitation which is prescribed therein applies where an order has been passed by the employer under the standing orders. In the present case, there is no order by the employer. Hence, the period of three months which is prescribed by Rule 53 can have no application at all.

10. This position in law is not res intergra,

but is the subject matter of several decisions of Learned Single Judges of this Court as well as of the Division Bench. In Jayavant Yashwant Raut v. Simplex Mills Ltd. (1995 II CLR 641) Mr. Justice B.N. Srikrishna (as His Lordship then was) speaking for this Court adverted to the provisions of Section 78(1)A(a) and held thus :

> "In order that a dispute falls under this provision, it must first be shown that there is an order passed by the employer and that the order is either in fact passed under the applicable standing orders or, at least purported to have been passed under the Standing Orders by the employer. In the petitioner's case as the findings of the Industrial Court show, there was no order which has been communicated. As far as the petitioner was concerned, he was merely being orally refused work, right from December 1982, without any one even having disclosed to him the reason for such refusal or his contract of employment having been terminated. If in these circumstances,

the employee makes a request that he be taken on work and kept in employment, I am unable to accept the view of the Industrial Court that such a dispute must necessarily, be held to be a dispute within the meaning of section 78(1)(a)(i) so as to attract the rigour of the limitation prescribed under Rule 53(2) of the Bombay Industrial Relations Rules. In my view, the ends of justice would have been much better served if a liberal construction had been adopted by holding that the dispute was one which fell properly within clause (iii) of sub-paragraph (a) paragraph A of sub-section (1) of section 78. In my view since there was neither an order of termination of service, nor any declaration of the reasons for which work was not being given to the petitioner, the petitioner was justified in making an approach even on 31st May 1984 and seeking the relief of being kept back on work and in employment. A dispute of such nature, in my view would be a change sought by the

employee in respect of Item 6 of Schedule III of the Act which would properly fall within clause (iii) of section 78(1)(A)(a). Once we come to the conclusion, it is obvious that the approach letter dated 31st May, 1984 would not be hit by the limitation prescribed in Rule 32(2) of the Bombay Industrial Relations Rules, 1947, and, therefore, would be valid approach. Consequently, the application based thereupon would be maintainable."

11. The same view was taken in Morarjee Gokuldas Spg. and Wvg. Co. Ltd. v. Maruti Yeshwant Narvekar (1999 II CLR 850); in National Textile Corporation SM Ltd. v. Shivaji Shankar Gawde (1994 II CLR 1059) and in a subsequent judgment delivered by me in Parshuram Ganpat Bhoir v. National Textile Corporation (S.M.) Ltd., Mumbai (2002(2) Mh.L.J.79). Counsel appearing on behalf of the Respondent relied upon a decision of Mr. Justice R.J. Kochar in National Textile Corporation (South Maharashtra) Ltd. v. Mohd. Umar Mohd. Hanif (2001 II CLR 145). This decision

was followed by Mr. Justice Kochar in a matter which went in appeal before a Division Bench consisting of Mr. Justice A.P.Shah and Mr. Justice S.A.Bobde, in Shankar Vasudeo Masurkar v. Shree Sitaram Mills (2002 III CLR 141). In that case, one of the workmen had joined service in 1970 while another had joined in 1972. Following the general strike in the textile industry in January 1982, the workmen claimed that they had reported for duty but were not allowed to enter the premises of the mill. According to the workmen their services had never been terminated and in January 1993 they issued approach notices under Section 42(4) of the Act. The Labour Court upheld the legality of the approach letters. In appeal, the Industrial Court held that those letters were not barred by limitation. In a petition under Article 226, R.J.Kochar J. relying upon his earlier decision in Mohd.Umar's case (supra) held that the approach notices were barred by limitation. In an appeal against the decision of the Single Judge, the Division Bench relied upon several judgments of Single Judges of this Court including those which have been adverted to in the earlier part of this judgment and held thus:

> "In our opinion since there was neither order of termination of service nor any declaration of the reasons for which the work was not being given to the appellants, the appellants were justified in making an approach even in 1993 and seeking a relief of taking them back on work and in employment. A dispute of such nature, in our view, would be a change sought by the employees in respect of Item No.6 of Schedule III of the Act which would properly fall within clause (iii) of section 78(1)(A)(a) of the Act."

The view taken in the judgment of R.J.Kochar, J. was overruled.

12. The law laid down by this Court in this consistent line of decisions has obviously not been cited before the Industrial Tribunal. Were these decisions cited, there could be no doubt about the fact that the Tribunal would have not fallen into the error into which it fell.

13. The workman stepped into the witness box in support of his case. In the course of his deposition the workman stated that he had worked continuously from 1973 till 18th January, 1982 when the general strike commenced. He stated that when he reported for duty on 18th January, 1982, he was not allowed to enter the gates by the watchmen. The workman stated that he used to thereafter report for duty for one month despite which he was not allowed to resume duty and the security staff informed him at the gate that his name would appear on the notice board after which he would be allowed to resume work. The workman stated that he waited until 1984 after which he went to his village since he had no source of income in Mumbai. He stated specifically that he had during this period neither received any show cause notice nor any charge sheet or for that matter a letter of termination. Eventually he submitted his approach notice. The workman stated in the course of his cross examination that he had never been on strike. Though in the course of his examination he had stated that he had sent several letters to the company, the workman admitted that these had not been filed on the record. The witness who deposed

on behalf of the management admitted that the company had not issued a show cause notice, charge sheet or an order of dismissal to the applicant worker. Though according to the witness, the management had issued a public notice in two newspapers calling upon the workers to join duty he stated in the course of the cross examination that the names of the workers were not mentioned in the notice nor had he delivered notice to the office of the newspapers.

14. The evidence on the record shows that there has been no cessation of the relationship of employer and employee in this case. In the present case, it is not the contention of the management that the services of the workman were terminated. The management's own witness candidly admitted that there was no order of dismissal. In a matter relating to a general strike, the governing principles of law have been laid down by the Supreme Court in Gujarat Steel Tubes Ltd. v. The Mazdoor Sabha (AIR 1980 SC 1896). The Supreme Court has held that a mere non reporting for work by a workman does not lead to an irrebuttable presumption of active participation in a strike.

More is necessary to bring home the element of mens rea and the burden lies on the management. In Changunabai Chanoo Palkar v. Khatau Makanji Mills Ltd. (1992 I CLR 660) the Division Bench of this Court held thus :

> "The pertinent point to be borne in mind in disciplinary jurisdiction, when absence during an illegal strike is admitted or proved, is that the industrial jurisprudence makes a cardinal distinction and maintains a clear dichotomy between passive and active strikes. This is considered essential and of practical importance because the kind of quantum of punishment has to be modulated in accordance with the nature of participation in the strike. The real question required to be determined in course of the disciplinary proceedings in such cases is : Did the individual worker, who has to suffer the penalty, actively involve himself or did he merely remain quiescent non-worker, during the explosive period? It must be remembered,

> for example, that not reporting for work and remaining at home for fear or vengeance in a para violent situation or, if the employment is in an urban area on account of economic compulsion and to avoid starvation in case of a prolonged strike, does not lead to a inevitable presumption of active participation in an illegal strike. More is needed to bring home the mens rea and that burden is on the management. The strike being illegal is really a non-issue under such circumstances. The focus is on active participation. Mere absence, without more, does not compel the conclusion of active participation or involvement."

15. In the present case, it must be noted that it is not even the case of the management that the services of the Petitioner were terminated for any act of misconduct of having associated with or for participation in the strike.

16. The workman had in the present case

submitted his approach notice on 14th January, 1993. The approach notice for the reasons which are already indicated hereinabove was not barred by the statutory period of limitation. That being the position, the dismissal of the application of the workman on the ground of limitation was clearly improper. The delay on the part of the workman in submitting the notice on 20th January, 1993 for the first time, however is a circumstance which can and must be taken into consideration in structuring the final relief which should be awarded to the workman. The Labour Court took that factor into consideration in depriving the workman of backwages for a period of nearly nine years between January 1984 and January 1993. The Labour Court was, in my view, justified and even correct in arriving at this decision to structure the relief so as to deprive the workman of the backwages for the period prior to the submission of the approach notice. The Labour Court, however, did allow backwages for the period between January 1982 and December, 1983 consistent with the testimony of the workman that he had reported for work during that period. The grant of backwages after January 1993 till reinstatement was clearly warranted since this

represented the period when the workman was kept out of work despite his approach notice. The object of furnishing an approach notice is to enable the employer to resolve the dispute by an amicable settlement. Section 42(4) therefore provides that an application can lie before the Labour Court or, as the case may be, the Industrial Court only after a notice has been moved before the employer and no agreement has been arrived at within the period prescribed. In that view of the matter, I am of the view that the Labour Court was entirely justified in taking the view which it did. The order of the Industrial Court is manifestly inconsistent with the settled principles of law laid down by a line of authority of this Court. The interference of this Court under Article 227 is accordingly warranted. In the circumstances, the order of the Industrial Court dated 18th February, 2002 shall stand quashed and set aside. The Petitioner shall be entitled to the relief in terms in which it was granted by the Labour Court in its judgment and order dated 18th May, 1998. Backwages shall be paid and the order of the Labour Court as affirmed by this Court shall be complied with within a period of two months from today. The

Petition is accordingly disposed of.